1989

State of Utah v. Richard Alvin Likes : Brief of Respondent

Utah Court of Appeals

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OCKET NO. 890544-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890544-CA
v.	:	
RICHARD ALVIN LIKES,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM A CONVICTION OF BURGLARY OF A BUSINESS, A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1978) IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR MILLARD COUNTY, STATE OF UTAH, THE HONORABLE CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of burglary of a business, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1978), in the Fourth Judicial District Court, in and for Millard County, State of Utah, the Honorable Cullen Y. Christensen, presiding.[1]

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was defendant's sixth amendment right to confront witnesses against him violated?

2. Did defendant's confession, admitted at trial, violate defendant's right not to testify against himself and was that confession voluntary?

[1] Although defendant was convicted of theft, in violation of Utah Code Ann. § 76-6-404 (1978), a second degree felony pursuant to Utah Code Ann. § 76-6-412(1)(b)(i) (1978) (amended 1989), as well as burglary of a business, he has chosen to appeal only the burglary conviction. Judgment was entered in accordance with the two convictions on August 23, 1989 (R. 131-136).

3. Did the trial court properly deny defendant's motion to suppress evidence?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

STATEMENT OF THE CASE

Defendant, Richard Alvin Likes, was charged with burglary of a business and theft (R. 10, 11). Defendant filed a motion to suppress evidence seized pursuant to a search warrant based on the belief the evidence was not in plain view (R. 26-27). Defendant also moved to suppress defendant's "alleged confession" (R. 26-27, 29-30). The trial court denied defendant's motion(s) (R. 53-58, T. 216). Defendant was convicted on both counts after a jury trial (R. 151-52, case file no. 1085, State of Utah v. Kevin Jon Nield). Defendant appeals only the burglary conviction.

STATEMENT OF FACTS

On the evening of May 16, 1988, at approximately 9:30 to 10:00 p.m., Gerald Freeman, the owner of Fillmore Diesel, Fillmore, Utah, received information that his business might be burglarized that night (T. 122). He called the Millard County Sheriff's Department and asked for an extra patrol that evening (T. 82, 122). Deputy Sheriff Scott Corry received Mr. Freeman's call at 10:00 p.m. and checked the diesel shop at midnight. At that time he found the doors locked and secured (T. 83). When he returned at 2:30 a.m. on May 17, he found that the chain link securing the west bay doors had been cut (T. 84). He called Mr. Freeman, who immediately came to the shop and began to determine what had been taken (T. 86, 127). During his initial investigation of the burglary, Deputy Corry took photographs of two sets of greasy footprints left on the concrete floor of the shop (T. 86-87).

Later that morning (May 17) Deputy Corry spoke with Mr. Freeman, who was then able to give him a preliminary list of missing items. That list included a sander, mig welder, power tools and hand tools (Suppression Hearing (S.H.) 37; T. 127). Because of the size of the shop and the many tools used there, a complete inventory of stolen items was not completed until May 18 or 19 (S.H. 36; T. 28). Later on May 17 Mr. Freeman received information that he could find his missing tools at Kevin Nield's apartment (S.H. 48-49). He contacted Deputy Corry who obtained a search warrant for Mr. Nield's apartment and several vehicles. The description of the property subject to seizure under the search warrant was as follows:

> shop equipment, air tools, mig welder, desk calculator, auto tools stolen from Gerald D. Freeman, Fillmore Diesel, Fillmore, Utah on 5/17/88 during a burglary.

(R. 9). At 12:15 a.m. on May 18, Deputy Corry searched the Nield apartment and seized numerous items, including a pair of 18 inch bolt cutters, which were found in the clothes closet in the front room of the apartment (R. 12; S.H. 9, 20; T. 88, 90). Defendant, who was then living in the Nield apartment, and Kevin Nield (co-defendant) were then arrested and charged with burglary and theft. Mr. Freeman subsequently identified the bolt cutters as possibly his, since he was required by state law to have bolt cutters for his wreckers, and he had found an 18 inch set missing from one of his vehicles (S.H. 39-40; T. 129-30).

After defendant's arrest he was taken to the Millard County Jail, where he spent the remainder of the night (T. 204). At approximately 1:00 p.m. on May 18, Deputy Corry began interviewing defendant concerning the Fillmore Diesel burglary (T. 206). In the course of the interview, which lasted approximately three and one-half hours, defendant confessed that the co-defendant and he had broken into Fillmore Diesel, had taken several items and had hidden them in the Fillmore area (T. 210, 222). Defendant filed a motion to suppress his confession, arguing generally that the confession was not voluntary (R. 26-28). At trial the court heard testimony and argument on defendant's motion, made factual findings and denied the motion (T. 216).

Defendant also filed a motion to suppress the seized bolt cutters, arguing that they were not in plain view in the co-

defendant's apartment (R. 26-27). After a hearing on the motion to suppress, the trial court denied the motion (R. 53-58).[2]

At the joint trial of defendant and co-defendant Nield, the bolt cutters were admitted along with testimony from an expert from the Utah State Crime Laboratory positively identifying the bolt cutters as those that had been used to cut the chain link at Fillmore Diesel (T. 55). The State also offered into evidence a pair of gym shoes taken from defendant. Deputy Corry identified their tread design as being "similar or the same" as the tread on the footprints he photographed at Fillmore Diesel on the night of the burglary (T. 96). Also received into evidence were a sander, two jack stands and a mig welder, found in a box underneath a pile of "junk" in the shed behind the Nield apartment in October 1988, and turned over to the sheriff on January 5, 1989 (T. 98-100, 243-49). Mr. Freeman positively identified the mig welder as his and testified that he believed the jack stands and sanders were also his because they looked like his, they were found with the mig welder and his were

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[2] The trial court's ruling on the motion to suppress is captioned with only co-defendant Kevin Jon Nield's name, but it includes defendant's criminal case number, 1082 (R. 59). Defendant did not argue his "plain view" position at the suppresssion hearing and did not submit a memorandum in support of his motion. The co-defendant argued that the search warrant used to seize the bolt cutters lacked sufficient particularity. The court heard oral argument on that issue at the suppression hearing, and the co-defendant filed a memorandum in support of his motion (Record of Co-defendant at 66-71). Consequently, the trial court's ruling addressed only the particularity issue. Nevertheless, defendant's case number was captioned in the ruling and defendant apparently accepts the fact that his motion to suppress was denied. Therefore, the State, in its argument, assumes the fact of the denial of defendant's motion to suppress the bolt cutters. See Point III, infra.

still missing (T. 133-34).

Deputy Corry testified concerning his interview of defendant after his arrest and recounted defendant's confession (T. 222).

SUMMARY OF ARGUMENT

The trial court's admission of testimony concerning defendant's confession did not violate the sixth amendment because defendant fully cross-examined the witness who took the confession.

The trial court properly admitted the testimony concerning defendant's confession, correctly ruling that the confession was voluntary.

The trial court properly admitted the seized bolt cutters.

ARGUMENT

POINT I

THE TRIAL COURT'S ADMISSION OF TESTIMONY CONCERNING DEFENDANT'S CONFESSION DID NOT VIOLATE THE SIXTH AMENDMENT.

Defendant seemingly argues that the introduction of his confession at trial without the opportunity to fully cross-examine Deputy Corry, who took the confession, violates the sixth amendment to the United States Constitution. (Br. of App. at 6).[3]

[3] Points I and III of defendant's brief are identical to Points I and II, respectively, of his co-defendant, Kevin Nield's, appellate brief, filed previously in this Court. Co-defendant Nield's argument was responded to fully by the State in a brief which is attached hereto as Addendum A and incorporated herein. That argument attacked the admission at trial of defendant Likes' confession, as testified to by Deputy Corry, as being a violation of co-defendant Nield's right to confront witnesses against him, i.e. defendant Likes, who declined to testify. Such an argument

That argument is not supported by the record. Defendant had ample opportunity to cross-examine Deputy Corry at trial, and he did so (T. 223-28). Defendant's assertion is meritless.

POINT II

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY CONCERNING DEFENDANT'S CONFESSION.

Defendant argues that his confession, admitted at trial, was done so in violation of his rights not to testify against himself, as found in Utah Const. art. I, § 12 and Utah Code Ann. § 77-1-6 (1982) (Br. of App. at 14). However, defendant failed to assert that ground for suppression below, and an appellate court in this state will not entertain such an objection for the first time on appeal. In State v. Johnson, 771 P.2d 326 (Utah Ct. App.), cert. granted, ___ P.2d ___ (Utah 1989), this Court stated that "where a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal." Id. at 328 (quoting State v. Carter, 707 P.2d 656, 660 (Utah 1985)). See also State v. Lee, 633 P.2d 48, 53 (Utah) cert. denied 454 U.S. 1057 (1981) ("There is nothing in the record to indicate that the point now urged upon this Court was unavailable or unknown to defendant at the time he filed his motion to suppress, and to entertain the point now would be to sanction the practice of withholding positions that should properly be presented to the trial court but which may be

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[3] Cont. is utterly inapplicable to the instant case and requires no analytical response.

withheld for the purpose of seeking a reversal on appeal and a new trial or dismissal.").

Defendant further argues that his confession was coerced and not voluntary (Br. of App. at 14). However, defendant cites no authority in support of his position and provides no legal analysis. Rule 24(a)(9) of both the Utah Supreme Court and the Utah Court of Appeals states that an appellate brief "shall contain the contentions of the appellant with respect to the issues presented and the reasons therefore, with citations to the authorities, statutes, and parts of the record relied on." In State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984), the Utah Supreme Court declined to rule on an issue because the defendant had "fail[ed] to support his argument by any legal analysis or authority." See also State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (footnote omitted) ("A brief must contain some support for each contention. [Defendant's] brief totally fails to provide any reasons to support [his] contention. . . . We therefore must disregard this issue."); State v. Pascoe, 774 P.2d 512, 514 n.1 (Utah Ct. App. 1989) ("[A]ppellant failed to support his [this] contention with legal analysis or authority. We, therefore, decline to rule on it."). Because defendant fails to substantively argue his position, the Court has no basis from which to evaluate or rule on his contention.

Should this Court consider the merits of defendant's contention, the Utah Supreme Court has established the standard applicable for reviewing the "voluntariness" of a confession. In State v. Carter, 776 P.2d 886 (Utah 1989), the Court stated that

the State has the burden of proving that a defendant's confession was voluntary by a preponderance of the evidence and that voluntariness is determined by the totality of the circumstances. Id. at 890 (citing State v. Bishop, 753 P.2d 439, 463-64 (Utah 1988)). Absent clear error or abuse of discretion a trial court's ruling will not be reversed. State v. Kelly, 718 P.2d 385, 392 (Utah 1986). See also State v. Hegelman, 717 P.2d 1348, 1349 (Utah 1986).

In the instant case Deputy Corry, who interviewed defendant and took his confession, testified concerning that interview. He stated that defendant had been arrested between 1:30 a.m. and 2:00 a.m. on May 17 [sic] (the arrest was actually made on May 18), taken to the Millard County Jail and booked and put in a holding cell (T. 203-04). The facility was heated, a bed was available and defendant had access to restrooms up until the time of the interview later on May 18 (T. 204-06). Deputy Corry testified that defendant would have had two opportunities to eat prior to the 1:00 p.m. interview, a morning meal at 8:00 a.m. and a noon meal (T. 205). The interview took place at the Millard County Security Center in a room approximately 10 feet by 14 feet and lasted approximately three and one-half hours (T. 205-06, 211). Defendant appeared alert to Deputy Corry at the time of the interview, and his Miranda rights were read to him prior to the start of the interview (T. 207). Deputy Corry stated that defendant confessed within the first 40 minutes of the interview and that no breaks were taken during the duration of the interview (R. 211). When defendant requested an attorney,

the interview ceased (T. 215). Defendant declined to testify, and he offered no other evidence rebutting deputy Corry's testimony.

The trial court made the following findings:

> Well, it appears to the Court in this circumstance as to the voluntariness of the alleged statement, it doesn't appear to the Court that circumstances of the arrest of the defendant or the interview of the defendant was [sic] unreasonable. It appears he had an opportunity to terminate the interview, in fact ultimately did. That he was not held in any unreasonable circumstances. He was given the Miranda warning prior to any discussion being undertaken. He agreed to talk with the officer.

(R. 216). Based on those findings, the trial court denied defendant's motion to suppress. In light of the unrebutted evidence that the State offered, the trial court did not clearly err or abuse its discretion in denying defendant's motion.

POINT III

THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE DEFENDANT CHALLENGES ON APPEAL.

As noted supra, defendant's Point III here is identical to co-defendant Nield's Point II in his appeal. The State responded fully to that assertion in its brief in co-defendant's case. That argument is attached hereto as Addendum A. However, defendant failed to assert the "warrant particularity" issue below. In his motion to suppress, defendant argued only that the bolt cutters in question were not in plain view in the co-defendant's apartment (R. 26-27). As noted supra, defendant's failure to assert a particular ground for suppression below precludes an appellate court from considering that ground on appeal. See State v. Johnson, 771 P.2d at 328.

CONCLUSION

For the foregoing reasons, defendant's conviction should be affirmed.

DATED this 26 day of March, 1990.

R. PAUL VAN DAM
Attorney General

JUDITH S.H. ATHERTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Respondent was mailed, postage prepaid, to Milton T. Harmon, attorney for defendant, 36 South Main Street, P.O. Box 97, Nephi, Utah 84648, this 26 day of March, 1990.

ADDENDUM A

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890465-CA
v.	:	
KEVIN NIELD,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF BURGLARY OF A BUSINESS, A THIRD DEGRR FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (SUPP. 1978), IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR MILLARD COUNTY, STATE OF UTAH, THE HONORABLE CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of burglary of a business, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1978), in the Fourth Judicial District Court, in and for Millard County, State of Utah, the Honorable Cullen Y. Christensen, presiding.[1]

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENT ON APPEAL

Defendant's issues on appeal are whether defendant's sixth amendment right to confront witnesses against him was violated and whether the trial court properly denied defendant's motion to suppress evidence.

---

[1] Although defendant was convicted of theft, in violation of Utah Code Ann. § 76-6-404 (1978), a second degree felony pursuant to Utah Code Ann. § 76-6-412(1)(b)(i) (1978) (amended 1989), as well as burglary of a business, he has chosen to appeal only the burglary conviction. Judgment was entered in accordance with the two convictions on August 23, 1989 (R. 216-221).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

STATEMENT OF CASE

Defendant, Kevin Jon Nield, was charged with burglary of a business and theft (R. 3, 4). Defendant filed a motion to suppress evidence seized pursuant to a search warrant based on the belief that the warrant description of property to be seized was insufficiently particular (R. 30-32). The trial court denied defendant's motion, and defendant was convicted on both counts after a jury trial (R. 151-52). Defendant appeals only the burglary conviction.

STATEMENT OF FACTS

On the evening of May 16, 1988, at approximately 9:30 to 10:00 p.m., Gerald Freeman, the owner of Fillmore Diesel, Fillmore, Utah, received information that his business might be

burglarized that night (T. 122). He called the Millard County Sheriff's Department and asked for an extra patrol that evening (T. 82, 122). Deputy Sheriff Scott Corry received Mr. Freeman's call at 10:00 p.m. and checked the diesel shop at midnight. At that time he found the doors locked and secured (T. 83). When he returned at 2:30 a.m. on May 17, he found that the chain link securing the west bay doors had been cut (T. 84). He called Mr. Freeman, who immediately came to the shop and began to determine what had been taken (T. 86, 127). During his initial investigation of the burglary, Deputy Corry took photographs of two sets of greasy footprints left on the concrete floor of the shop (T. 86-87).

Later that morning (May 17) Deputy Corry spoke with Mr. Freeman, who was then able to give him a preliminary list of missing items. That list included a sander, mig welder, power tools and hand tools (Suppression Hearing (S.H.) 37; T. 127). Because of the size of the shop and the many tools used there, a complete inventory of stolen items was not completed until May 18 or 19 (S.H. 36; T. 28). Later on May 17 Mr. Freeman received information that he could find his missing tools at defendant's apartment (S.H. 48-49). He contacted Deputy Corry who obtained a search warrant for defendant's apartment and several vehicles. The description of the property subject to seizure under the search warrant was as follows:

> shop equipment, air tools, mig welder, desk calculator, auto tools stolen from Gerald D. Freeman, Fillmore Diesel, Fillmore, Utah on 5/17/88 during a burglary.

(R. 9). At 12:15 a.m. on May 18, Deputy Corry searched defendant's apartment and seized numerous items, including a pair of 18 inch bolt cutters, which were found in the clothes closet in the front room of the apartment (R. 12; S.H. 9, 20; T. 88, 90). Defendant and co-defendant Richard Alvin Likes were then arrested and charged with burglary and theft. Mr. Freeman subsequently identified the bolt cutters as possibly his, since he was required by state law to have bolt cutters for his wreckers, and he had found an 18 inch set missing from one of his vehicles (S.H. 39-40; T. 129-30).

Defendant filed a motion to suppress the bolt cutters, arguing that the warrant under which they were seized lacked the requisite particularity (R. 30-31). After a hearing on the motion to suppress, the trial court denied the motion. In doing so it issued extensive, specific findings of fact. The court found that Mr. Freeman maintained a shop filled with "all types of small and large tools including hand tools, power tools, air tools and equipment of all types" needed to repair heavy equipment and that on the night of the burglary he was able to point out "several more significant items of equipment . . . missing such as a mig welder and . . . [a] desk calculator but . . was not able to identify each specific item of tools [sic] because of the large inventory and numerous types" he kept (R. 58-9). It found that Mr. Freeman could not tell specifically what was missing until he did a complete inventory and that in the meantime Mr. Freeman was informed that some of his "stuff" could be found in defendant's apartment (R. 59-60). The court

further found that Mr. Freeman reported the information to Deputy Corry "who proceeded to obtain a search warrant on May 17, 1988, with the best information he had, i.e., the description of the type of tools and specific items of equipment furnished by Mr. Freeman, short of a formal inventory" (R. 60). It found that Deputy Corry and Mr. Freeman had determined that at the time of the burglary access to the shop had been gained by cutting a chain securing the shop doors and that at the time of the search warrant execution Mr. Freeman did not know that he was missing bolt cutters since that item was customarily kept in a tow truck (R. 60). The court found that when he was advised that bolt cutters had been found in defendant's apartment, Mr. Freeman checked his tow truck and determined that bolt cutters were missing and stated that the seized bolt cutters looked like the one's missing from his truck (R. 60-61). The court found that the bolt cutters were capable of cutting the chain securing the doors of Mr. Freeman's shop (R. 61). Finally, the court found that Mr. Freeman had not been able to make an inventory to determine the missing tools until the day following the burglary and after the search warrant was executed. (R. 60).

At the joint trial of defendant and co-defendant Likes, the bolt cutters were admitted along with testimony from an expert from the Utah State Crime Laboratory positively identifying the bolt cutters as those that had been used to cut the chain link at Fillmore Diesel (T. 55). The State also offered into evidence a pair of work boots taken from defendant. Deputy Corry identified their tread design as being "very

similar" to the tread on the footprints he photographed at Fillmore Diesel on the night of the burglary (T. 95). Also received into evidence were a sander, two jack stands and a mig welder, found in a box underneath a pile of "junk" in the shed behind defendant's apartment in October, 1988, and turned over to the sheriff on January 5, 1989 (T. 98-100, 243-49). Mr. Freeman positively identified the mig welder as his and testified that he believed the jack stands and sanders were also his because they looked like his, they were found with the mig welder and his were still missing (T. 133-34). Angie Carpenter, an acquaintance of defendant, testified that defendant had told her prior to the burglary and theft that he was going to break into Gerald Freeman's shop and take what he could "get ahold [sic] of" to get even with him (T. 164-65). She further testified that on the morning after the burglary defendant told her he had broken into Mr. Freeman's shop and taken some equipment (T. 166-67).

During the trial Deputy Corry testified concerning his interrogation of co-defendant Likes after his arrest. During the interrogation the co-defendant had confessed to the burglary and theft and, in doing so, had also implicated defendant. At trial, the co-defendant declined to testify, and Deputy Corry recounted the co-defendant's admission to him as it related to the co-defendant's involvement in the burglary and theft (T. 222).

SUMMARY OF ARGUMENT

The trial court properly admitted testimony concerning the co-defendant's confession as not being a violation of defendant's sixth amendment right to confront witnesses against him.

The trial court properly admitted evidence seized pursuant to a valid search warrant. Even if the warrant were deemed technically insufficient as to certain evidence seized, the evidence could have been properly seized under the plain view doctrine. Finally, if the evidence in question is deemed to have been improperly admitted, there was other evidence sufficient to support defendant's conviction, and the error was harmless.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY OF THE CO-DEFENDANT'S CONFESSION AS NOT BEING VIOLATIVE OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM.

Defendant argues that his right to confront witnesses against him, as guaranteed by the sixth amendment to the United States Constitution and article I, section 12 and Utah Constitution,[2] was violated in the instant case when the trial court permitted the introduction of evidence of his co-defendant's confession at their joint trial. Defendant premises his argument on the assumption that the co-defendant's confession was introduced as evidence against defendant and expressly implicated and powerfully incriminated him in the commission of the crime for which they were being tried. (Br. of App. at 9). That premise cannot be supported in light of the facts of the

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[2] At trial, defendant limited his argument to guarantees secured under the sixth amendment to the United States Constitution. Since the application of independent state grounds to dispose of the issue was not argued at the trial level, introduction of such an argument is precluded on appeal. State v. Johnson, 771 P.2d 326, 328 (Utah Ct. App. 1989). Accordingly, the State will not analyze defendant's confrontation issue under article I, section 12 of the Utah Constitution.

case. A review of the testimony in question and counsels' lengthy arguments that preceded its admission will clarify the factual posture of this case and dispose of defendant's sixth amendment argument.

At trial the State sought to allow Deputy Scott Corry to testify concerning co-defendant Likes' confession, received during interrogation, that defendant and he had committed the crime in question. Although the co-defendant's confession was admissible against himself as an exception to the hearsay rule, all parties were concerned that the testimony would not "wash over" and implicate defendant (T. 182-196). In determining whether the co-defendant's confession could be admitted, the trial court reviewed both United States Supreme Court and Utah cases.

In Bruton v. United States, 391 U.S. 123 (1968), a postal inspector testified at the defendant's and co-defendant's joint trial that the co-defendant had orally confessed to him that both the defendant and the co-defendant had committed the crime in question. The trial court allowed the inspector to testify and thus implicate both defendant and co-defendant but specifically instructed the jury to disregard the co-defendant's admission as it applied to the defendant. The United States Supreme Court, in reversing the defendant's conviction, held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statement in determining [defendant's] guilt, admission of . . . [co-defendant's] confession in . . . [their]

joint trial violated . . . [defendant's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." Id. at 126.

In Richardson v. Marsh, 481 U.S. 200 (1987), the United States Supreme Court fully discussed the narrow Bruton exception to the "almost invariable assumption of the law that jurors follow their instructions." Id. at 206. There the Court stated that the narrow Bruton exception applied when the "facially incriminating confession of a nontestifying co-defendant [was] introduced at their joint trial." Id. at 207 (emphasis added). In Bruton, the co-defendant's testimony both "expressly implicat[ed]" the defendant and was "powerfully incriminating." Id. at 208. In Richardson, the co-defendant's confession was redacted to omit all reference to the defendant, and the jury was instructed not to consider the co-defendant's confession against the defendant. In upholding the trial court's admission of the testimony with its limiting instruction, the Court emphasized the narrowness of the Bruton doctrine. It held that the "Confrontation Clause [was] not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when . . . the confession [was] redacted to eliminate not only the defendant's name, but any reference to his or her existence." Id. at 211.

The Utah Supreme Court has adopted the Bruton and Richardson analysis of the sixth amendment right to confrontation. In State v. Ellis, 748 P.2d 188 (Utah 1987), the Utah Supreme Court interpreted Bruton and declined to apply it to

the facts of that case. There, inconsistent statements made by co-defendants at the time of their arrest were admitted into evidence by the testimony of the arresting police officer. Because the statements did not rise to the level of directly implicating either defendant, the Court did not apply Bruton, stating that to invoke the Bruton doctrine, "a statement must be powerfully and facially incriminating with respect to the other defendant and must directly, rather than indirectly, implicate the complaining defendant in the commission of the crime." Id. at 190 (citing Richardson v. Marsh, 481 U.S. 200, 207, 208 (1987)).

In the instant case, the trial court properly limited the co-defendant's confession pursuant to Richardson. The pertinent portion of Officer Corry's testimony is as follows:

> Q. [State] What did Mr. Likes [co-defendant] tell you then during the interview, basically?
> A. [Deputy Corry] Mr. Likes [co-defendant] told me that he broke into Fillmore Diesel, that he used a set of bolt-cutters to cut the lock, and that he took several items from the business and placed them in an undisclosed location somewhere in the Fillmore area.

(T. 222).

No reference, either direct or indirect, was made to defendant. The statement neither powerfully nor facially incriminated defendant. Therefore, the Bruton doctrine is not applicable.

In addition to limiting the testimony concerning the co-defendant's confession, the trial court here expressly instructed the jury as follows:

> In connection with the evidence that has been received in this case, ladies and gentlemen,

> there have [sic] been and offered a statement attributable to the defendant Likes, to him individually. You are instructed that whatever weight or credit you give to that statement is not to be considered in any way or fashion in your determination of whether or not the defendant Nield may be guilty or innocent.

(T. 340-a).

The trial court limited the scope of Officer Corry's testimony concerning the co-defendant's confession to permit no reference to defendant and specifically instructed the jury that evidence of the co-defendant's confession could be attributed only to the co-defendant. In doing so, the trial court properly applied the protective legal standards of Richardson. The admission of the testimony did not violate defendant's sixth amendment right to confront witnesses against him.

POINT II

THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE DEFENDANT CHALLENGES ON APPEAL.

Defendant challenges the trial court's denial of his motion to suppress arguing that the warrant under which the bolt cutters were seized did not describe them with sufficient particularity. In reviewing the trial court's ruling, this Court applies the following standard:

> In considering the trial court's action in denying defendant's motion to suppress, we will not disturb its factual evaluation unless the findings are clearly erroneous . . . . The trial judge is in the best position to assess the credibility and accuracy of the witnesses' divergent testimonies. . . . However, in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a 'correction of error' standard. . . .

State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App. 1989) (citations omitted); See also Termunde v. Cook, No. 890495, slip op. at 2 (Utah Feb. 6, 1990). But see State v. Cole, 674 P.2d 119, 122 (Utah 1983); State v. Gallegos, 716 P.2d 207, 208-09 (Utah 1985); State v. Ashe, 745 P.2d 1255, 1268-69 (Utah 1987) (which suggest that the "clearly erroneous" standard applied to the trial court's factual evaluation and its legal conclusion). In the instant case defendant does not challenge the trial court's factual findings, as delineated in its ruling on defendant's motion to suppress and outlined supra. Therefore, this court need only assess the trial court's legal conclusion that the description of items to be seized in the warrant was constitutionally sufficient.

The fourth amendment to the United States Constitution requires that search warrants particularly describe articles to be seized. However, an exact match between the property seized and the description in the warrant is not constitutionally required. In State v. Gallegos, 712 P.2d 207, 209 (Utah 1985), the Utah Supreme Court stated:

> The decision to seize must be judicial, as opposed to administrative, and the warrant must be sufficiently particular to guide the officer to the thing intended to be seized, thereby minimizing the danger of unwarranted invasion of privacy. Accordingly, the line between what is and what is not sufficiently particular must be drawn with a view to accomplishment of the constitutional purpose and necessarily varies with the circumstances and with the nature of the property to be seized.

(footnote citations omitted). See also State v. Anderson 701 P.2d 1099, 1102 (Utah 1988) ("The adequacy of a description in a

search warrant depends in every instance upon the particular facts of the case"); Namen v. State, 665 P.2d 557, 560 (Alaska 1983) ("The requisite degree of particularity must be determined by the totality of the circumstances in each case."). In the instant case, Deputy Corry, acting on a tip concerning the whereabouts of stolen items and fearing that the items might be disposed of quickly, obtained a search warrant based on the most complete information he had available to him at the time (R. 7, 60). A complete inventory of items missing was not available to him at the time of the search, and his reliance on the warrant in seizing the bolt cutters was justified. This conclusion is consistent with the language from a case cited with approval in Gallegos, 712 P.2d at 209 n.10:

> The amount of particularity required in naming the items to be seized for a given warrant to be valid will vary with the circumstances and with the ability of the complainants to be specific.

People v. Harmon, 90 Ill.App.3d 753, 755, 46 Ill.Dec. 27, 29, 413 N.E.2d 467, 469 (1980) (emphasis added) (citation omitted).

Defendant's repeated assertion that the "shop equipment, air tools, mig welder, desk calculator, auto tools" warrant description is "generic," that is, applicable to an entire class of property, and his reliance on State v. Gallegos as being factually similar to the instant case are unjustified. In Gallegos the warrant ordered seizure of "all controlled substances and stolen property." There, the Utah Supreme Court, while holding that the description "stolen property" was insufficiently particular, stated that general descriptions could

be held sufficient "[in cases] where attendant circumstances prevented a detailed description from being given." State v. Gallegos, 712 P.2d at 209, 210 (quoting Namen v. State, 665 P.2d at 561-62). Although the warrant description in the instant case is substantively more particular than in Gallegos, even if it could be termed "general," it would fall under the Namen exception just noted. The trial court's factual findings that the victim was not able to make an inventory until after the search and that Deputy Corry proceeded to obtain a search warrant with the best information he had are unchallenged by defendant and are dispositive of the issue. The trial court did not err in its legal conclusion denying defendant's motion to suppress.

Even if this Court were to conclude that the search warrant description was open to challenge, the bolt cutters could have been seized validly under the plain view doctrine. As stated in State v. Kelly, 718 P.2d 385, 389 (Utah 1986), seizure under the plain view doctrine requires that 1) the officer be lawfully present; 2) the evidence be in plain view; and 3) the evidence be clearly incriminating. The "clearly incriminating" standard requires an officer to have probable cause to believe that the item to be seized is evidence of a crime. Id. at 390. See Arizona v. Hicks, 480 U.S. 321, 326 (1987); State v. Babbell, 770 P.2d 987, 993 (Utah 1989). Here, Deputy Corry was present in defendant's apartment and searching the closet therein pursuant to a validly issued search warrant. The bolt cutters were in plain view in the closet and Deputy Corry had probable cause to believe them to be evidence of the crime. It was Deputy Corry

who had first discovered the burglary of Fillmore Diesel and he knew that the chain link securing the doors of the shop had been cut. Bolt cutters capable of cutting chain link, whether or not they belonged to the victim, could be properly seized as evidence of the crime.

Finally, even if this Court were to conclude that the bolt cutters were erroneously admitted as evidence, enough other evidence was admitted to sustain defendant's conviction, and the error would be harmless. Evidence of defendant's footprints on the shop floor found on the night of the burglary, stolen items recovered from the shop behind defendant's apartment, and testimony by Angie Carpenter that defendant told her he intended to break into Fillmore Diesel and that he had done so support defendant's conviction. No reasonable likelihood exists that without the admission of the bolt cutters there would have been a different result. See State v. Nickles, 728 P.2d 123, 129 (Utah 1986) (citing State v. Hutchinson, 655 P.2d 635 (Utah 1982); Utah R. Evid. 103(a), Utah R. Crim. P. 30(a)).

CONCLUSION

For the foregoing reasons, defendant's conviction should be affirmed.

DATED this 20 day of February, 1990.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Respondent, was mailed, postage prepaid, to Sheldon R. Carter, attorney for defendant, 3325 North University Ave., Suite 200, Provo, Utah 64604, this 28 day of February, 1990.